

SHAHAMIN FAIZUL KUNG ABDULLAH

a

v.

ASMA HJ. JUNUS

HIGH COURT MALAYA, PENANG

EDGAR JOSEPH JR J

[CRIMINAL APPLICATION NO. 44-62-89]

b

22 JULY 1991

CONSTITUTIONAL LAW: *Difference between “ordinary law” and “law affecting the Constitution” - Whether s. 4 of Courts of Judicature Act 1964 was law affecting the Constitution - Article 121(1)(A) not in force at date of commencement of 1964 Act - High Court has jurisdiction - Federal Constitution, Articles 4, 121(1)(A) - Civil Law Act 1956, s. 27 - Courts of Judicature Act 1964, ss. 4, 23, 24.*

c

FAMILY LAW: *Custody - Parties are Muslims - Jurisdiction of High Court challenged - Whether Kathi’s Court has jurisdiction - Whether exclusive jurisdiction - Whether decision of the civil Court prevails - Jurisdiction of Syariah Court - Date of commencement of art. 121(1)(A) which conferred such jurisdiction of High Court - Whether law affecting the Constitution - Administration of Muslim Law Enactment 1952, ss. 45(6), 46(1)(b), Selangor - Administration of Muslim Law Enactment 1959, Penang, ss. 40(1), (2), (3)(b) - Civil Law Act 1956, s. 27 - Courts of Judicature Act 1964, ss. 4, 23 & 24 - Federal Constitution, Articles 4, 121(1)(A) - Guardianship of Infants Act 1961, ss. 5, 11 - Guardianship of Infants (Extension) Enactment 1961, Selangor - Guardianship of Infants (Adoption) Act 1961, Penang - Statute Law Revision Enactment 1965, Penang.*

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CIVIL PROCEDURE: *Custody - Parties are Muslims - Jurisdiction of High Court - Whether prevailed over jurisdiction of Kathi’s Court - Whether Kathi’s Court had exclusive jurisdiction - Decision of civil Court to prevail - Effect of excluding High Court from jurisdiction of Syariah Court - Date of commencement of such conferment - Not in force at date of commencement of Courts of Judicature Act 1964 - Whether s. 4 of Courts of Judicature Act 1964 was law affecting the Constitution - Administration of Muslim Law Enactment 1952, ss. 45(6), 46(1)(b), Selangor - Administration of Muslim Law Enactment 1959, Penang, ss. 40(1), (2), (3)(b) - Civil Law Act 1956, s. 27 - Courts of Judicature Act 1964, ss. 4, 23, 24 - Federal Constitution, Articles 4, 121(1)(A) - Guardianship of Infants Act 1961, ss. 5, 11 - Guardianship of Infants (Extension) Enactment 1961, Selangor - Guardianship of Infants (Adoption) Act 1961, Penang - Statute Law Revision Enactment 1965, Penang.*

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The applicant father is applying for custody of his 6 year old son, who is currently in the care of his maternal grandmother, the respondent. As both the parties are Muslims, a preliminary objection was raised by the respondent in that the High Court had no jurisdiction to hear this application as such jurisdiction was solely vested in the Court of a *Kathi* or *Kathi Besar* under s. 39 of the Administration of the Muslim Law Enactment of Penang, 1959 (the Enactment).

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Held:

[1] Although the 1959 Enactment does expressly confer general civil jurisdiction on the Court of the *Kathi Besar* to hear and determine proceedings where the parties profess the Muslim religion and which relate, *inter alia*, to the guardianship of custody of infants, such jurisdiction is not exclusive. The very wide terms of ss. 23 and 24 of the Courts of Judicature

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a Act 1964 (the 1964 Act) when read together with s. 4 of the 1964 Act, provide strong reinforcement for that conclusion, subject to any limitation imposed by the Federal Constitution in force at the commencement of the 1964 Act.

b [2] The repeal of the Penang Guardianship of Infants (Adoption) Act 1961 only affects the law to be administered by the High Court when exercising jurisdiction in cases of applications for custody, that is, the principles to be applied when exercising its discretion in arriving at a decision on the merits of the application.

c [3] Article 121(1)(A) of the Federal Constitution which states that the High Courts of Malaya and Borneo shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts, came into force after the date of the commencement of the 1964 Act. Therefore, pursuant to s. 4 of the 1964 Act, ss. 23 and 24 would still prevail to confer jurisdiction on the High Court to hear the present application.

d [4] Although the Constitution is the federal law of the land, “law” in Article 4(1) with reference to Acts of Parliament, means federal law consisting of ordinary laws enacted in the ordinary way and not Acts affecting the Constitution; only the former must be consistent with the Constitution. Section 4 of the 1964 Act is a provision affecting the Constitution because its effect is to render ineffective amendments to the Constitution pertaining to the jurisdiction of the High Court made after the date of its commencement unless made with retrospective effect.

[Challenge to jurisdiction fails; hearing of application to proceed on merits.]

Cases referred to:

- e** *Myriam v. Mohamed Ariff* [1971] 1 MLJ 265 (cit)
Nafsiah v. Abdul Majid [1969] 2 MLJ 174 (cit)
Roberts v. Umi Kalthom [1966] 1 MLJ 163 (cit)
Ali Mat bin Khamis v. Jamaliah binti Kassim [1974] 1 MLJ 18 (cit)
Re Omar bin Shaik Salleh [1948] MLJ 186 (cit)
Inland Revenue Commissioners v. Ayrshire Employers’ Mutual Insurance Association Ltd. [1946] 1 All ER 637 (cit)
f *Phang Chin Hock v. Public Prosecutor* [1980] 1 MLJ 70 (cit)

Legislation referred to:

- Civil Law Act 1956, s. 27
 Courts of Judicature Act 1964, ss. 4, 23, 24(a), (b), (d)
 Courts Ordinance 1948, s.109
 Federal Constitution, arts. 4, 121(1)(A), 159
g Guardianship of Infants (Adoption) Enactment (Penang) 1961, ss. 5, 11
 Administration of Muslim Law Enactment (Penang) 1959, ss. 39, 40(1), (2), 49(3)(b)
 Administration of Muslim Law Enactment (Selangor) 1952, ss. 45(6), 46(1)(b)(iii)

Other source referred to:

- The Amendment to Article 121 of the Federal Constitution: Its Effect on Administration of Islamic Law*
 by Tan Sri Datuk Professor Ahmad Ibrahim
h *For the applicant - Darshan Singh Khaira; M/s. Darshan Singh & Co.*
For the respondent - Abdul Razak bin Yaacob; M/s. Razak & Co.

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JUDGMENT

Edgar Joseph Jr J:

Although this application is, on the face of it, for a writ of *habeas corpus*, it is, in substance and effect, an application for custody of a male child six years of age. The application is made by the father of the child (whose mother had died) and the respondent, in whose care the child is, is the maternal grandmother of the child. The parties are Muslims and so a preliminary objection has been taken by Counsel for the respondent that this Court has no jurisdiction to entertain the application because it is the Court of a Kathi or Kathi Besar constituted under s. 39 of the Administration of Muslim Law Enactment 1959, of Penang which alone has such jurisdiction.

The Administration of Muslim Law Enactment 1959, of Penang, establishes the Courts of Kathi Besar (Chief Kathi) and Kathi (s. 40(1) and s. 40(2)). By s. 49(3)(b), the general civil jurisdiction of the Court of the Kathi Besar is defined as follows:

(3) the Court of the Kathi Besar shall:

(b) in its civil jurisdiction, hear and determine actions and proceedings in which all the parties profess the Muslim religion and which relate to:

(i) betrothal, marriage, divorce, nullity of marriage, judicial separation, or *nushuz*;

(ii) any disposition of, or claim to property arising out of any of the matters set out in sub-para (i) of this paragraph;

(iii) maintenance of dependants, legitimacy, guardianship or custody of infants;

(iv) division *inter vivos* of sa-pencharian property;

(v) *wakaf* or *nazr*; or

(vi) other matters in respect of which jurisdiction is conferred by any written law:

Provided that it shall not ordinarily try any offence or hear or determine any action or proceeding in respect of which any Court of the Kathi has jurisdiction.

Myriam v. Mohamed Ariff [1971] 1 MLJ 265, was a Selangor case, concerning an application by the mother for the custody of two children, a girl aged 8 years and a boy aged 3 years. Earlier, in the Kathi's Court at Petaling Jaya, by consent of the parties a divorce with condition (Talak, Taliq) was granted; the condition being that the father should have custody of the children with access to the mother. The Kathi's consent order giving custody to the father was made under s. 46(1)(b) of the Selangor Administration of Muslim Law Enactment 1952. On behalf of the father, it was objected that such a consent order could not be appealed against in the High Court, regard being had to s. 46(1)(b)(iii) of the Enactment, the material portions of which read:

...no appeal shall lie against a decision of the (Kathi) made by consent.

But, Abdul Hamid J (as he then was) construed this portion of the sub-section as relating only to maintenance of dependants and not to custody of children. The Court then founded its jurisdiction to hear the application by the mother on s. 45(6) of the Enactment which reads:

Nothing in this Enactment contained shall affect the jurisdiction of any civil Court and, in the event of any difference or conflict arising between the decision of a Court of the Kathi Besar or a Kathi and the decision of a civil Court acting within its jurisdiction, the decision of the civil Court shall prevail.

a The Court went on to hold that ss. 5 and 11 of the Guardianship of Infants Act 1961, were applicable, by virtue of the Selangor Guardianship of Infants (Extension) 1961, as there was nothing to show that these provisions conflicted with or were contrary to the Muslim religion or custom of the Malays.

b Turning to the present case, it is true that the Administration of Muslim Law Enactment 1959, of Penang, contains no provision equivalent to s. 45(6) of the Administration of Muslim Law Enactment of Selangor but, on the other hand, there is nothing therein which confers exclusive jurisdiction on the Court of the Kathi Besar in matters relating to custody of Muslim children. It must therefore be determined whether even without such provision, this Court has jurisdiction to hear and determine the present application.

c First of all, I would refer to the relevant provisions of the Courts of Judicature Act 1964, defining the civil jurisdiction and powers of the High Court.

Section 23 reads as follows:

- (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try **all** civil proceedings where:
 - d** (a) the cause of action arose, or
 - (b) the defendant or one of several defendants resides or has his place of business, or
 - (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
 - (d) any land the ownership of which is situated,
 - e** within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.
- (2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction. (Emphasis supplied).

f Section 24 reads as follows:

Without prejudice to the generality of s. 23, the civil jurisdiction of the High Court shall include:

- g** (a) jurisdiction under any written law relating to divorce and matrimonial causes;
- (b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981;
- (c) jurisdiction under any written law relating to bankruptcy or to companies;
- (d) **jurisdiction to appoint and control guardians of infants and generally over the person and property of infants;**
- h** (e) jurisdiction to appoint and control guardians and keepers of the person and estates of idiots, mentally disordered persons and persons of unsound mind; and
- (f) jurisdiction to grant probates of wills and testaments and letters of administration of the estates of deceased persons leaving property within the territorial jurisdiction of the Court and to alter or revoke such grants. (Emphasis is mine)

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Section 4 reads as follows:

In the event of inconsistency or conflict between this Act and any other written law **other than the Constitution in force at the commencement of this Act**, the provisions of this Act shall prevail. (Emphasis supplied)

I must next refer to the Guardianship of Infants Act 1961, since it had been adopted to persons professing the Muslim religion within the State of Penang, by the Guardianship of Infants (Adoption) Enactment 1961, but with the proviso, omitting immaterial parts, that nothing in the Act which is contrary to the Muslim religion or the custom of the Malays shall apply to any person under the age of eighteen years who professes the Muslim religion and whose father professes or professed at the date of his death that religion.

In particular, I would reproduce, ss. 5 and 11 of the Guardianship of Infants Act since they are not contrary to the Muslim religion or the custom of the Malays; They read as follows:

Section 5:

Subject to the provisions of s. 10 the father of an infant shall be the guardian of the infant's person and property:

Provided that the Court or a Judge may make such order as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent, and may vary or discharge such order at any time on the application of either parent.

Section 11

The Court or a Judge, in exercising the powers conferred by the foregoing provisions of this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

I must next refer to the two decisions of the High Court of Malaya which may assist in the resolution of the point at issue.

In the Malacca case of *Nafsiah v. Abdul Majid* [1969] 2 MLJ 174, being an action for damages for breach of promise to marry, there was also a challenge to the jurisdiction of the High Court to hear the suit, but it was overruled by a rather different route from that adopted in *Myriam v. Mohamed Ariff* (*supra*). In particular, the challenge as to jurisdiction was based on s. 40(3)(b) of the Administration of Muslim Law Enactment 1959, which reads as follows:

The Court of the Kathi Besar shall in its civil jurisdiction hear and determine all actions and proceedings in which all the parties profess the Muslim religion and which relate to marriage.

Sharma J in refusing to construe this provision as excluding his jurisdiction, relied on two pieces of legislation: namely, the Courts of Judicature Act 1964, which by ss. 24(a) and (b) specifically gave the secular Courts jurisdiction in suits for damages and, more importantly, s. 4 of the same Act, which confers an overriding authority on the secular High Court in cases where legislative inconsistency has to be resolved. Furthermore, s. 109 of the Courts Ordinance 1948, (which was not repealed by the Courts of Judicature Act) provides that in cases of inconsistency between the provisions of that Ordinance and any other legislation the provision of the former shall prevail.

In *Roberts v. Umi Kalthom* [1966] 1 MLJ 163 Raja Azlan Shah J (as he then was and now the Yang di Pertuan Agung) held that the High Court had power to hear and determine a claim to jointly acquired property of Muslims, despite the fact that the jurisdiction to hear and determine such a claim was conferred by the Administration of Muslim Law Enactment on the Kathi's Court.

a My research into the authorities (not cited to the Court), compels me to the conclusion that although the Administration of Muslim Law Enactment 1959, Penang, does expressly confer general civil jurisdiction on the Court of the Kathi Besar to hear and determine proceedings where the parties profess the Muslim religion and which relate, *inter alia*, to the guardianship or custody of infants, such jurisdiction is not exclusive. This is emphasised by the fact that the Guardianship of Infants Act 1961, has been expressly adopted (subject to the provisions of a proviso which do not affect the present case) to persons professing the Muslim religion within the State of Penang by the Guardianship of Infants (Adoption) Enactment 1961. Furthermore, the very wide terms of ss. 23 and 24 of the Courts of Judicature Act when read together with s. 4 of the same Act, to which I have referred above, provide strong reinforcement for that conclusion.

c It makes no difference, therefore, that the Administration of Muslim Law Enactment 1959, of Penang, does not expressly state, as do most of the equivalent State Enactments in the States of Malaya, that nothing in the Enactment shall affect the jurisdiction of any civil Court and that in the event of any difference or conflict, arising between a decision of a Court of the Kathi Besar or a Kathi and the decision of a civil Court acting within its jurisdiction, the decision of the civil Court shall prevail. Had there been such a provision in the Administration of Muslim Law Enactment of Penang, the position would, in my opinion, have been merely *a fortiori*.

d The challenge to jurisdiction is, therefore, dismissed and I am now prepared to hear the application on its merits.

e While tidying up the draft of this judgment, there are, I find, two omissions which I must repair. The first concerns the Penang Statute Law Revision Enactment 1965, while the second concerns Article 121(1)(A) of the Federal Constitution.

f More particularly, I have noticed that the Penang Guardianship of Infants (Adoption) Enactment 1961, had been repealed by the Penang Statute Law Revision Enactment 1965, with effect from 27 January 1966. However, I do not consider that this makes any difference to my conclusion that the challenge to the jurisdiction of this Court should be dismissed. The ample breadth of the provisions of ss. 23 and 24 of the Courts of Judicature Act, when read together with s. 24 of the same Act, (reproduced above) gives each High Court overriding jurisdiction in all civil proceedings in any civil cause arising within its local jurisdiction, subject only to the limitation (if any) imposed by the Federal Constitution in force at the commencement of the same Act. Specifically, the matters included within their civil jurisdiction, of direct relevance to the question which arises for decision in this case, are those relating to the appointment and control of guardians of infants and generally over the person and property of infants. (See s. 24(d)).

g So, for example, in *Ali Mat bin Khamis v. Jamaliah binti Kassim* [1974] 1 MLJ 18, a suit for, *inter alia*, the recovery of *harta sepencarian*, a matter within the jurisdiction of the Court of the Kathi Besar according to the relevant legislation of the State of Negri Sembilan, the High Court asserted jurisdiction relying on s. 23 of the Courts of Judicature Act. Wan Sulaiman J (as he then was) said at p. 19:

I would not hesitate to hold that, short of specific words to that effect, the above provision of the Negri Sembilan Enactment was not intended to take away the jurisdiction in civil matters given to a High Court by s. 23 of the Courts of Judicature Act 1964.

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I recognise, however, that the effect of the repeal of the Penang Guardianship of Infants (Adoption) Act 1961, by the Penang State Statute Law Revision Enactment 1965, renders inapplicable the Guardianship of Infants Act 1961, to persons professing the Muslim religion within the State of Penang but this does not affect the legal question of jurisdiction; it only affects the ethical question of the way in which that jurisdiction should be exercised, in particular, the way in which the Court should exercise its discretion in selecting the appropriate rule for decision on the merits of the application for custody. In other words, it only affects the law to be administered by the High Court when exercising jurisdiction in **such** cases; that is to say, the principles to be applied when exercising its discretion in arriving at a decision on the merits of the application.

Amplifying the point, during the period 1961 to 1965, the law administered by the High Court when exercising jurisdiction in such cases was to be found in the Guardianship of Infants Act 1961. But, prior to and after that period, the law to be administered by the High Court when exercising jurisdiction in **such** cases, had to or would have to be selected, as the case may be, regard being had to the provisions of s. 27 of the Civil Law Act 1956, which provides:

In all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Act, regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by any written law.

Indeed, in *Myriam v Mohamed Ariff* (*supra*) the ethics of setting a standard for the exercise of discretion in deciding the application for custody on the merits was found within the framework of s. 27 of the Civil Law Act which introduced English Law as to custody “regard being had to the religion and customs of the parties concerned.” The Court then applied these standards to Muslim parties and held relying on *Ameer Ali* (and Anglo-Muhammedan precedent), ‘that even under Muslim law the general principle that governs the custody of infants is the welfare of the infant’. In support the Singapore case of *Re Omar bin Shaik Salleh* [1948] MLJ 186 was cited with approval.

There is another and more substantial ground for mounting a challenge to the jurisdiction of this Court to hear the present application and, that is, Article 121(1)(A) of the Federal Constitution which was inserted by the Constitution (Amendment) Act 1988, which came into effect on 10 June 1988, and reads as follows:

The Courts referred to in Clause (1) (the High Courts of Malaya and Borneo) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

It is obvious that the draftsman had intended by Article 121(1)(A) to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Courts. The only question which now arises is whether he had succeeded in that objective. If he has not then the Court will not come to his aid as the decision of the House of Lords in *Inland Revenue Commissioners v. Ayrshire Employers’ Mutual Insurance Association Ltd.* [1946] 1 All ER 637 plainly illustrates. In that case, the draftsman’s mistake was treated as being past correction by the addition of words. Lord Macmillan said that the “legislature has plainly missed fire” while Lord Simonds observed:

The section ... is clearly a remedial section, if that is a proper description of a section intended to bring further subject matter within the ambit of taxation. It is at least clear what is the gap that is intended to be filled and hardly less clear how it is intended to fill that gap. Yet I can come to no other conclusion than that the language of the section fails to achieve its apparent purpose and I must decline to insert words or phrases which might succeed where the draftsman failed.

a In views of its pivotal importance regarding this part of the case, I must now, once again, reproduce s. 4 of the Courts of Judicature Act; it reads:

In the event of inconsistency or conflict between this Act and any other written law **other than the Constitution in force at the commencement of this Act**, the provisions of this Act shall prevail. (Emphasis is mine)

b The Courts of Judicature Act, except for s. 5, came into force on 16 March 1964. Section 5 came into force on 16 September 1964. But, Article 121(1)(A), as I have already noted, came into force only as recently as 10 June 1988 by virtue of Act A 704. In other words, it was not in force at the date of the commencement of the Courts of Judicature Act. Therefore, by virtue of s. 4 of the Courts of Judicature Act, ss. 23 and 24 thereof would, in my opinion, still prevail to confer jurisdiction on this Court to hear the present application. It would have been otherwise if Article 121(1)(A) had been enacted with retrospective effect so as to have been in force at the date of commencement of the Courts of Judicature Act.

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I have not overlooked Article 4(1) of the Constitution which provides:

This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

d It is true that the Constitution is the supreme law of the land. But “Law” in Article 4(1), with reference to Acts of Parliament, means federal law consisting of ordinary laws enacted in the ordinary way and not Acts affecting the Constitution. Only the former must be consistent with the Constitution. As Suffian LP said in *Phang Chin Hock v. PP* [1980] 1 MLJ 70, 72 col. 1, H & I:

e In our judgment, in construing Article 4(1) and Article 159, the rule of harmonious construction requires us to give effect to both provisions and to hold and we accordingly hold that Acts made by Parliament, complying with the conditions set out in Article 159, are valid even if inconsistent with the Constitution, and that a distinction should be drawn between on the one hand Acts affecting the Constitution and on the other hand ordinary laws enacted in the ordinary way. It is federal law of the latter category that is meant by law in Article 4(1); only such law must be consistent with the Constitution.

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Section 4 of the Courts of Judicature Act, in my view, is a provision affecting the Constitution because its effect is to render ineffective amendments to the Constitution pertaining to the jurisdiction of the High Courts made after the date of its commencement unless made with retrospective effect.

g A final point needs to be made. Tan Sri Datuk Professor Ahmad Ibrahim in his article entitled “*The Amendment to Article 121 of the Federal Constitution: Its Effect on Administration of Islamic Law*”, has made the plea that s. 4(1) of the Courts of Judicature Act be repealed. I would respectfully echo that plea so that effect may be given to the intention of the draftsman.

h Accordingly, I see no reason for departing from my conclusion that the challenge to jurisdiction fails and that the hearing of the application on the merits should proceed.

Also found at [1991] 3 CLJ 2220

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